Testimony of
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Mr. Chairman, members of the committee, fellow panel members and other distinguished guests, my name is Bill Brim and I am president of Lewis Taylor Farms in Tifton, GA. Our farm is a 2750-acre diversified vegetable operation, growing and packing peppers, tomatoes, eggplant, cucumbers, squash, cabbage, greens and cantaloupes. We also operate more than 350,000 square feet of greenhouse space, growing more than 85 million vegetable transplants and more than 15 million pine seedlings each year.

I serve as vice president of the Georgia Fruit and Vegetable Growers Association. I am here today not only representing my farm and association but also Georgia's fruit and vegetable industry—an industry that had a farm gate value of more than $750 million dollars in 2002.

I appreciate the opportunity to appear before this committee to discuss an issue that is extremely critical to the southeastern fruit and vegetable industry - labor. While I could spend most of my time providing numbers and statistics to illustrate the number of illegal workers we have in this country and especially in Georgia, farm wage rates and other somewhat dry details about the agricultural labor supply available to us, I would prefer to share my experience with labor at our farm and how our need for labor affects our operations.

I began using the H2A program in early 1998—the year after INS officials attended farm production meetings throughout Georgia warning farmers in attendance that there would be a crack down on illegal farm workers during the next peak production season. INS announced they would begin workplace enforcement on the east coast in March or April and 'sweep' southwest to Texas, arresting and removing any illegal workers from their unauthorized jobs. Subsequently there were two well-publicized raids in Vidalia, Georgia that interrupted the onion harvest. Since April of 1998, I am not aware of any INS raids on any other Georgia farms, though some rumors of actions have circulated. The failure to enforce immigration laws has exacerbated the problems H2A users face competitively.

Prior to our participation in H2A, we faced the following problem when attempting to secure an adequate workforce: Although most illegal workers have 'fake' social security cards and identification, federal laws regarding discrimination make it nearly impossible for employers to question the documents presented to us or to refuse employment if those documents appear to be legitimate. Because of our inability to verify employment authorization and the sheer numbers of illegal workers who appear during peak agricultural production, most of us found ourselves with workers whose documentation was questionable. Although we would not have been legally liable for hiring these workers because we completed "I-9's", the possibility of an INS raid at our farm or even the rumor of INS in the area would have caused illegal workers to scatter to avoid detention and possible deportation. To make matters worse, many legal workers usually vacate the farm to avoid the hassle of an INS interrogation. The resulting interruption of our crop activities would have occurred during our peak season, causing serious financial losses.

Because of the uncertainty of depending on a largely illegal workforce and our reluctance to rely on questionable "crewleaders", other growers in Georgia also determined that the H2A program was the only alternative we had. Despite its cost and red tape, we could employ a legal workforce. Prior to 1998, only one farm in Georgia was using the H2A program. Today we have more than forty agricultural employers who depend on the H2A program to provide thousands of legal farmworkers.

During the past seven years our association has worked for reform of the H2A program and provided input on several bills that had legislative support and offered true reform. This year a number of 'immigration' bills have been introduced. It is my opinion, of the current legislation being considered, only HR 3604 has the legislative language to truly reform H2A in a meaningful way.

It also appears that the President's immigration proposal has a number of good features but it is difficult to make comments on such a wide ranging proposal until actual legislative language is proposed…..the devil is always in the details.

But, after review of the details of HR 3604 we believe there are a number of very positive features:

- First and foremost—elimination of the Adverse Effect Wage Rate as it is now calculated. Replacing it with the prevailing wage rate based on similar jobs in the local area. This alone will allow H2A users to compete on a level playing field. I will discuss this in more detail later.

- Giving illegal workers now present in this country a chance to go home and return as legal, non-immigrant, visa-holding H2A workers.

- Streamlining the burdensome paperwork now required of employers who wish to apply for program participation.

- Shortening the timeframes so that petition processing is simpler and more in sync with agricultural planning.

- When housing is available locally, allowing vouchers in lieu of housing provision. This will particularly benefit growers whose crop seasons are short, making short term housing construction an expensive outlay.

On behalf of other Georgia growers and myself, I want to thank Chairman Goodlatte and his staff for their ongoing efforts to help us stay legal and competitive. We appreciate the Chairman's leadership in moving legislation that has a realistic chance of becoming law and resolving the most serious of issues for agricultural producers nationwide.

Unfortunately, if Congress does not enact some reform to the H2A program quickly, many Georgia growers will be forced to drop the program. My comments this morning will focus on the four most serious problems we are facing and the need for relief from these problems in all proposed H2A reform:

- The government-mandated ADVERSE EFFECT WAGE RATE (AEWR) which HR 3604 proposes to eliminate.
- The need to protect our domestic workforce.
- Inflexible "seasonality" definitions.
- Legal Services Corporation grantees targeting of H2A employers.

Adverse Effect Wage Rate (AEWR)

The AEWR is the most serious problem confronting H2A users. The Adverse Effect Wage Rate (AEWR) is the minimum wage rate which the US Department of Labor (USDOL) has determined must be offered and paid to US and foreign agricultural workers by employers of nonimmigrant foreign agricultural workers (H2A visa holders). Such employers must pay "*the higher of the AEWR, the applicable prevailing wage or the statutory minimum wage." (From the USDOL website providing these wages.)*

However, the USDOL does NOT determine these wages; they are based solely on USDA's National Agricultural Statistics Service (NASS) quarterly surveys of farm labor, field and livestock combined.

Growers' concerns regarding the AEWR are:

- The NASS surveys of farm labor were not designed to provide "prevailing" wages for specific farm occupations. For instance, sorting and packing workers are not included in the NASS survey although they make up a large percentage of workers hired under H2A. Temporary and seasonal workers are not differentiated from permanent farm employees. The imposition of the AEWR on our packing operations is our most pressing concern, since most of our field workers routinely exceed the AEWR by their piece rate production.

- The USDOL applies these wages without regard for the differences in occupations, skills, seasonality.

- The NASS survey result is the average of all wages, including the wages (expressed as "hourly") that are paid to workers whose higher production level entitles them to additional incentive (piecework) pay. The USDOL turns that "average" into "minimum" for purposes of the AEWR, thereby producing a continual upward ratcheting effect in states in which large numbers of growers use H2A to obtain a legal workforce.

- NASS publishes text along with the surveys that explains unusual circumstances in a given quarter that could affect wages, e.g. weather delays, crop failures, etc. None of these factors are considered by USDOL when imposing/projecting these wage rates for the upcoming year.

- State Employment Services are funded by USDOL to conduct agricultural wage surveys which are occupation, location and activity specific, but if these state-determined wages are lower, they default to the hourly AEWR established by the NASS survey. Because the state surveys are face-to-face, with results differentiated by job duties, geographic location and piece rate as well as hourly rates, it would appear that those results represent the true wages paid to agricultural workers.

- Agricultural employers who use the H2A program to avoid breaking the law by hiring questionably-documented workers are put at a distinct competitive disadvantage. The expense of using H2A is a factor in the agricultural industry's increasing dependence on an illegal workforce.

- State AEWR annual percentage increases often far exceed the wage increases in other industries and annual increases in the Consumer Price Index.

Growers who use the H2A program have repeatedly requested that the Secretary of Labor examine the methodology involved in the establishment of these adverse effect wage rates to determine if use of the NASS farm labor survey is appropriate for this purpose. These growers and their organizations contend that it is not appropriate. Our farm organizations also contend that use of this survey by USDOL for the purpose of setting wage rates negatively impacts the agricultural industry—both in free market competition and voluntary compliance with immigration laws.

Under the current H2A program beginning in the spring of this year I will be guaranteeing all workers a wage rate of $ 7.88. I will also pay for the workers' transportation to and from their country of residence to my farm and provide them with free housing during the term of their contract. I also pay Workers Compensation on all my workers—coverage which is not required of agricultural employers by the state of Georgia. I am providing all of these worker benefits while competing non-H2A vegetable growers are using a largely undocumented workforce and paying about $5.50 per hour for the same jobs—a

cost differential of $2.38 an hour alone, not to mention the costs of the other H2A-required benefits.

H.R. 3604, "Temporary Agricultural Labor Reform of 2003" does replace the AEWR with 'the prevailing wage', but I would caution this committee to be sure any agricultural "prevailing wage" definition and methodology is the same as that used to produce wage rates for similar non-agricultural jobs in the same geographic area.

Also, on the issue of wages for H2A workers, agricultural domestic workers face the same deductions as any US worker—FUTA, FICA, state and federal taxes, etc., but H2A visa-holding workers are exempted by Internal Revenue tax definitions from these deductions. We respectfully request that any H2A reform bill include language clarifying that exemption.

The following are issues of concern under the current H2A regulations which we hope the Committee will address.

The Need to Protect Our Domestic Workforce

Growers understand that the time consuming red tape and complicated guidelines imposed by USDOL on H2A employers is because that agency still incorrectly believes that H2A takes jobs from and lowers wages of domestic workers.

Under our contract we are required to offer domestic workers employment until 50% of the contract is fulfilled. During the most recent growing season our farm had about 100 domestic workers referred and hired during the contract. Only one remains on our payroll. Since I began the using the H2A program I have never had any domestic workers that completed their contract, yet I am forced to take time to interview, hire, process paperwork, modify my payroll and accommodate every person that the State Labor Department sends to me for months during my busiest season. No other industry using non-immigrant visa workers is required to protect domestic workers in this fashion.

In many areas H2A employers are paying unskilled farm workers a guaranteed hourly wage that is significantly more than the wage paid by local industry and manufacturing plants for the same kinds of unskilled jobs. The inflated H2A wage rate attracts a lot of domestic applicants but despite this financial incentive, these workers are not willing to complete a full crop season. We cannot operate a farm without a dependable, adequate and available workforce.

With regard to H.R.3604, we ask that serious consideration be given to replacing the 50% rule for hiring domestic workers with a mandate to hire all referred workers up until the date the work actually begins. Employers are willing to hire all the domestic workers that apply for work up until the time guest workers depart their country en route to our

jobs. Any requirement that we continue to accept new workers after work has begun is costly and impedes production during our busiest times.

Inflexible "Seasonality" Definitions

Anyone who has ever farmed knows that "seasons" cannot be rigidly defined, and that a permanent workforce is not the answer to our labor needs, even on diversified farming operations. It is critical that any H2A reform address the issue of seasonal flexibility.

Most H2A employers agree that a majority of their H-2A guest workers want to go back to their home country after their contract has been completed. Since we have been involved with the program we have used more than 300 workers annually and had fewer than 25 guest workers (less than 1.2%) that violated the contract and departed our farm illegally. Most of our workers return year after year on multiple entry visas that allow them to come and go during the contract period if a need arises. We would definitely support a work visa of three years as proposed under the President's immigration plan that would allow our workers to come and go freely during those years.

However, short of a three-year contract, the nature of agricultural work demands more flexibility in the work contract's start and end dates than the 10 months proposed in HR 3604. We continually must adjust our workforce to accommodate crop delays, such as weather conditions, that cannot be foreseen when the original start and end dates are planned. We propose the following definition of "seasonality" as it applies to H2A applications:

> *The term "seasonal" means an annually recurring time period in which a particular crop is either planted, cultivated and/or harvested, along with the ancillary activities to support the primary activity. For the purposes of H2A eligibility, an application shall be considered "seasonal" if the crop(s) activity(ies) are traditionally performed in that geographical area during that time. There shall be no limit to the number of H2A applications that can be filed by an agricultural employer during a 12-month period as long as each application has a clearly specified "season" for that particular crop(s) and crop activity(ies).*

The On-going Threat of Legal Action

Most recently a federal court decision drastically affecting H2A users was issued by the 11th Circuit Court of Appeals, known most commonly as the "Arriaga Decision" or "Arriaga." This ruling changed a longstanding interpretation of the Fair Labor Standards Act by holding that H2A employers were responsible for reimbursing workers' costs of transportation, visa, passport and other fees during their first week of employment. This ruling ignored the fact that H2A regulations clearly mandated transportation

reimbursement at the 50% point and further ignored the issue of paying costs that were incurred outside the United States and prior to employment. Despite immediate compliance with the ruling, our H2A employer association was almost immediately sued for "willful violation" of a law that was not interpreted in this way until September of 2002. H.R. 3604 must clearly define what costs are "for the benefit of the employer" and which pre-employment costs are the worker's responsibilities, even if the bill's language pre-empts FLSA. The bill should also exempt fees and costs incurred by workers outside the United States from the jurisdiction of federal labor laws.

Another issue that discourages many employers from using H2A is the continual threat of litigation by Legal Services Corporation grantees. Since Georgia growers began using the H-2A program, members of our employer association have been sued by Legal Services Corporation grantees more than five times and we have spent in the neighborhood of $400,000 defending ourselves. Despite almost constant monitoring by Georgia Legal Services and countless investigations by USDOL's Wage and Hour Division, none of us have ever been found guilty of violating any law or significant regulatory compliance guideline.

Any H-2A reform must require mediation as the first step to resolving work place issues between an H-2A employer and any workers employed under the H2A contract prior to litigation being initiated (by either party) in state or federal court. In the President's State of the Union address, he stated the need to "*protect them (*businesses) *from junk and frivolous lawsuits."* A requirement that all publicly supported and pro bono legal services mediate before suing would be a positive step in this direction. Current law does not require mediation. We respectfully request that HR 3604 address this issue.

An adequate supply of dependable labor is the most critical issue our fruit and vegetable growers face in today's farm environment. On behalf of the Georgia Fruit and Vegetable Growers Association we look forward to working with this committee and other members of Congress to insure our growers have a viable and available work force.

Please feel free to call upon us.

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